UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

In re ENRON CORPORATION SECURITIES LITIGATION	§	Civil Action No. H-01-3624
	§	**(Consolidated)**
	§	
	§	CLASS ACTION
This Document Relates To:	§	
	§	
MARK NEWBY, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
ENRON CORP., et al.,	§	
	§	
Defendants.	§	
	§	
THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, et al., Individually and On Behalf of All Others Similarly Situated,	§	
	§	
Plaintiffs,	§	
	§	
vs.	§	
	§	
KENNETH L. LAY, et al.,	§	
	§	
Defendants.	§	
	§	

LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL DEEMED ADMISSIONS BY CIBC (DOCKET NO. 2121)

2352

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

STATUTES, RULES AND REGULATIONS

I. Introduction

Lead Plaintiff served CIBC with Requests for Admission concerning certain FAS 125/140 transactions which are the subject matter of plaintiffs' claims. Plaintiffs alleged CIBC falsified Enron's reported financial results with Hawaii 125-0, a FAS125/140 structure used to create false profits for Enron. *See* FACC ¶731. The Requests for Admission are based on CIBC's agreement with the United States Department of Justice, wherein CIBC agreed to a statement of facts which sets forth certain conduct of CIBC. Lead Plaintiff seeks admissions as to factual statements similar if not identical to the language used in the agreement. If CIBC admits the factual statements it will be detrimental to CIBC's defense of this action. At the same time CIBC agreed with the DOJ that it will not contradict such facts "in 'litigation or otherwise.'" *See* Motion at 1 (Docket No. 2080).

Faced with two perhaps equally poor alternatives, CIBC decided to resolve its dilemma by giving evasive responses to Lead Plaintiff's Requests for Admission. CIBC's purported excuse is that its convoluted responses are necessary to explain the "meaning" of its agreement with the DOJ. But CIBC's self-serving understanding of the meaning of its agreement with the DOJ is obviously not what plaintiffs seek by their Requests for Admission.

Notwithstanding, CIBC contends its Responses are justified because Lead Plaintiff's Requests for Admission "rewrite and modify" and "deliberately alter[] the language of the CIBC/DOJ Agreement." According to CIBC, it was "compelled" to create the maze of cross references in its answers and refer to "provisions of the CIBC/DOJ Agreement," in order to "clarify the meaning and context of the statements at issue." Opp. at 1-3. Absolutely not. CIBC can explain to a jury what the agreement means to CIBC, but until then, CIBC is obligated to admit or deny the factual statements set forth in Lead Plaintiff's Requests for Admission. If, as CIBC says, plaintiffs' Requests for Admission are based on sentences "extracted from their context in the CIBC/DOJ Agreement" (Opp. at 7), and Lead Plaintiff has "altered" definitions "to suit its litigation agenda,"

(*id.* at 10) then why doesn't CIBC simply deny the Requests for Admission? In point of fact, the Requests for admission do not ask CIBC about the context of its agreement or CIBC's understanding of the agreement, and CIBC is required to respond to the statements set forth in the Requests for Admission as those statements are posed to CIBC.

Lead Plaintiff is entitled to clear and meaningful responses to its Requests for Admission.

II. Argument

A. CIBC Fails to Explain the Meaning of Its Responses or Otherwise Justify Its Cross References and Qualifications

In its Responses to Requests for Admission 1, 3, 7, 8 and 9, CIBC incorporates by reference other objections and previous responses, resulting in answers that are incomprehensible. For purposes of its Opposition to Lead Plaintiff's Motion to Compel, CIBC characterizes its incorporation by reference as "cross-references," arguing they are ***purely internal*** and therefore a permissible form of response under the rules. No matter how CIBC chooses to characterize its method of responding, whether internal cross-referencing or incorporation by reference, the Responses violate FRCP because they are not simple, clear and concise.[1] And that such "cross-references" are internal is of no moment when such internal cross-referencing results responses that are evasive and vague. Indeed, while CIBC says that a "trier of fact would have no trouble reading and comprehending CIBC's Responses" (Opp. at 6), CIBC requires many pages of its Opposition to explain its cross references. *See id.* at 3-7. Nonetheless, CIBC still cannot explain why it chose to cross reference or even adequately convey the meaning of its cross references.

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[1] CIBC cites *Havenfield Corp. v. H&R Block, Inc.*, 67 F.R.D. 93, 96 (W.D. Mo. 1973) and *U.S. Plywood Corp. v. Hudson Lumber Co.*, 127 F. Supp. 489, 498 (S.D.N.Y 1954), in support of its argument that "CIBC is obligated under FRCP 36 only to respond fully and fairly to factual matters set forth in Lead Plaintiff's RFAs." Opp. at 5. Neither case addresses the situation at hand, whether the use of incorporation by reference is proper in responding to RFAs. These cases, therefore, are inapplicable.

The only discernable (yet clearly inadequate) reason CIBC offers for its cross referencing is that it was "compelled" to do so because Lead Plaintiff's Requests for Admission use the same language from the CIBC/DOJ Agreement. But Lead Plaintiff has not requested CIBC to interpret the meaning of its agreement. Lead Plaintiff has set forth factual statements and is entitled to a simple and concise denial or admission. Notwithstanding, according to CIBC, it must use cross referencing "to show the relationship of" language in the Requests for Admission "to other provisions in the CIBC/DOJ Agreement," and, CIBC suggests, this is necessary "to understand their meaning." Opp. at 3-4. Even assuming that was necessary (it is not), CIBC's cross referencing does nothing more than convolute (rather than convey) the meaning of its Responses. And the pages of explanation offered by CIBC, which simply boil down to a single inadequate reason for cross referencing, do not shed light on CIBC's Responses.

CIBC cites *United States v. Watchmakers of Switzerland,* 25 F.R.D. 197, 200 (S.D.N.Y. 1959), for the proposition that incorporation by reference or internal cross-referencing is permissible because the reader is not required to refer to external documents in order to understand the meaning of the responses. Opp. at 4. The case is wholly inapposite. The court, in that case, addressed whether "***certain requests are improper*** because they incorporate by reference other documents" not whether, as in this case, ***certain responses that incorporate other answers are improper***. *Watchmakers of Switzerland,* 25 F.R.D. at 200 (emphasis added). And in the context of requests which incorporate other documents by reference, the court noted "a certain amount of incorporation by reference may in ***exceptional circumstances*** be allowed," but never ruled on whether the incorporation was warranted. *Id.* (emphasis added). Despite CIBC's suggestion otherwise, the court never addressed or condoned the use of incorporation by reference in answers as opposed to requests.

At page 6 of its Opposition, CIBC says its Responses "encompass only 7 lines of text," and "contain straightforward admissions." Thus, having failed to explain the meaning of those seven lines of text over four pages of its Opposition, CIBC asks the Court to look at the "actual words" of the Responses. Opp. at 6 & n.1. The problem is that it is questionable what CIBC's purported admissions mean, if they mean anything, given the labyrinth of cross referencing and other matter included in CIBC's responses. Indeed, Lead Plaintiff attempted to track the "actual words" of CIBC's response to RFA No. 7 "as ... written by CIBC," and demonstrated for the Court, the truly meaningless, incomprehensible result caused by CIBC's use of incorporation by reference. *See* Motion to Compel at 6-7. CIBC belittled this as an "exercise in literary invention." Opp. at 6 n.1. But CIBC's contentions are belied by CIBC's inability to explain the meaning of, or justify, its responses. A trier of fact would be hard-pressed to read and comprehend CIBC's Responses to RFA Nos. 1, 3, 7, 8, and 9.

CIBC also asserts Lead Plaintiff must "present the entire text of the CIBC/DOJ Agreement and ask CIBC to authenticate or endorse it." *Id.* at 3. Again, Lead Plaintiff's Requests for Admission seek responses to statements of fact. CIBC's expressed belief as to how Lead Plaintiff should prosecute this case is no excuse for failing to adequately respond to Lead Plaintiff's Requests for Admission. Nor does CIBC's settlement with the DOJ excuse CIBC from properly responding to Lead Plaintiff's Requests for Admission in accordance with Rule 36(a). And, CIBC cannot dictate the format of Lead Plaintiff's, or any other party's, requests for admission. Nothing in FRCP 36(a) dictates any particular format Lead Plaintiff must follow in drafting its Requests for Admission or limits the scope of the Requests to authenticity of documents.

On the other hand, Rule 36(a) governs CIBC's responses and CIBC's "cross-referencing" or "incorporation by reference" in its Responses violates Rule 36(a). Accordingly RFA Nos. 1, 3, 7, 8 and 9 should be deemed admitted.

B. CIBC Does Not (and Cannot) Justify Its Attempts to Redefine Definitions and Terms Applicable to Lead Plaintiff's RFAs

In its several pages of "Objections and Clarifications to Definitions," CIBC impermissibly attempts to redefine specific terms in Lead Plaintiff's Requests for Admission to mirror definitions contained in CIBC's agreement with the DOJ. *See* Opp. at 8 ("'CIBC'" is a defined term in the CIBC/DOJ Agreement. "In the particular context of the CIBC/DOJ Agreement, it was deemed appropriate to use a defined term ...."); *id.* at 9 ("Lead Plaintiff supplies ***its own*** definition of 'FAS 125/140 transactions' and insists that CIBC rewrite its agreement with the DOJ ....") (emphasis in original). It is CIBC, not Lead Plaintiff, that is responsible for terms or definitions included as part of CIBC's settlement with the DOJ. Lead Plaintiff is not required to use terms and definitions drafted by CIBC and the Enron Task Force as part of CIBC's settlement agreement with the DOJ. The use of specific terms or definitions contained within the DOJ Agreement is an issue between CIBC and the DOJ, and not an issue as to CIBC's responses to Lead Plaintiff's RFAs. By requiring Lead Plaintiff to use the same definitions contained in the DOJ Agreement, CIBC is in effect forcing Lead Plaintiff to endorse the terms and meaning of that agreement. Such a requirement improperly shifts responsibility for any hidden, unexpressed meaning of CIBC's Agreement with the DOJ to Lead Plaintiff.

CIBC's redefinition of terms in Lead Plaintiff's Requests for Admission impermissibly qualifies and convolutes CIBC's Responses. For this additional reason, Requests for Admission Nos. 1 and 3-9 should be deemed admitted without objection or any qualification.

C. CIBC's Incorporation of "General Responses and Objections" Into Its Answers Impermissibly Qualifies Its Responses to the RFAs

Rule 36(a) prohibits CIBC from qualifying each of its Responses to the RFAs by incorporating "General Responses and Objections." *See* Rule 36(a) (providing that the "answer shall specifically deny the matter or set forth in detail why the answering party cannot truthfully admit or

deny the matter") CIBC's "prefatory objections" are not limited to merely "attorney client privilege or ask[ing] CIBC to admit matters other than statements of fact and genuineness of documents." Opp. at 10-11. CIBC has set forth seven paragraphs of General Responses and Objections which are incorporated into each of its answers to the RFAs. *See* Ex. C to Motion, at 2-3. Although CIBC claims it has not withheld any responses or refused to answer any RFAs based on these General Responses and Objections, that is not the issue given that the rules specifically prohibit the use of general objections and CIBC's responses are improperly qualified.

CIBC argues general objections and responses are appropriate in answering the RFAs by citing to paragraph 7 of its General Responses and Objections. CIBC's explanation for violating Rule 36(a) is that paragraph 7 denies "'"any implication or inference that Lead Plaintiff or any other party might seek to draw from the facts admitted by CIBC."'" Opp. at 11. CIBC claims to be reserving the right to argue "whatever reasonable inferences or legal effect ... may be derived from those words." *Id.* This objection is not necessary. Moreover, CIBC cites to no authority (it cannot), which permits this objection or any of CIBC's other General Responses and Objections. Paragraph 7 renders all of CIBC's Responses vague and meaningless. With such an objection there can be no implication or inference that may be drawn from any purported admission by CIBC.

CIBC's express incorporation of each "General Response and Objection" into each of its Responses unnecessarily and impermissibly qualifies all of CIBC's Responses. For this additional reason, Requests for Admission Nos. 1 and 3-9 should be deemed admitted without objection or any qualification.

D. CIBC Does Not (and Cannot) Justify Its Failure to Respond to Request for Admission No. 4 On the Ground Lead Plaintiff Has the Burden of Proof

CIBC asserts that in its Response to Request for Admission No. 4, it "has not refused to admit or deny any facts on the grounds that Lead Plaintiff bears the burden of proving those facts."

Opp. at 11. As Lead Plaintiff stated in its Motion, CIBC's lengthy Objection No. 7 and its Response to Request for Admission No. 4 that "'[p]laintiffs bear the burden of proving that any such "violation" by CIBC's employees took place,'" implicitly serves as a refusal to respond to the Request for Admission. Motion at 10-12. CIBC states that Lead Plaintiff "acknowledges" CIBC has not refused to respond to Request for Admission No. 4. Opp. at 12. But CIBC leaves out the fact that Lead Plaintiff has moved on the basis that CIBC's Response violates Rule 36.

Not only is CIBC's response impermissibly qualified by its general objections, it also is meaningless given that it simply does not address the subject matter of the Request for Admission.

Rather than admitting or denying the contents of RFA No. 4, CIBC refers back to its agreement with the DOJ and "'***admits that the CIBC/DOJ Agreement states*** that "CIBC accepts responsibility."'" Opp. at 12. Lead Plaintiff has not asked CIBC what its agreement with the DOJ states. Lead Plaintiff is asking whether CIBC is accepting responsibility for the conduct of its employees giving rise to ***any*** violation in connection with the FAS 125/140 transactions which are the subject of plaintiffs' claims. According to CIBC, it was "simply pointing out that the language" Lead Plaintiff used in its Request does not state CIBC admitted a violation in fact was committed by any CIBC employee. Opp. at 12. But Request for Admission No. 4 does not state or assume a violation occurred. Request for Admission No. 4 is intended to respond to any defense of CIBC that it should not be responsible for the conduct of its employees for whatever reason.

For these additional reasons, Requests for Admission Nos. 1 and 3-9 should be deemed admitted without objection or any qualification.

E. CIBC Does Not (and Cannot) Justify Its Refusal to Admit or Deny Its Understanding of the Equity Component of the FAS 125/140 Transaction It Entered into with Enron

Request for Admission No. 5 asks CIBC to admit or deny ***its understanding*** of the factual nature of the purported FAS 125/140 transactions that are the subject of plaintiffs' claims as well as

the subject of the DOJ agreement CIBC's excuses for not responding are as follows: "The propriety of the manner in which particular FAS 125/140 transactions were recorded by Enron on its balance sheet is a matter that CIBC lacked the knowledge and qualification to assess"; "at the time of Enron's FAS 125/140 transactions, there was a 'confusing, if not convoluted, set of guidelines regarding the consolidation of SPEs'"; "CIBC has admitted that the CIBC/DOJ Agreement contains the sentence at issue ...." Opp. at 13-14. RFA No. 5 does not ask how Enron recorded its FAS 125/140 transactions, or if the accounting guidelines as to FAS 125/140 transactions were confusing or if the DOJ agreement contains the sentence at issue. Lead Plaintiff is simply inquiring into CIBC's understanding of the 3% equity rule as to the FAS 125/140 transactions it engaged in with Enron. Given that CIBC was one of the 3% equity holder in Enron's FAS 125/140 transactions, CIBC must have understood what it meant to be a 3% equity holder. This is all that Lead Plaintiff is asking. CIBC is required to respond to RFA No. 5.

F. CIBC Is Required to Admit or Deny the Accuracy of Financial Information Contained in RFA No. 2

Request for Admission No. 2 asks CIBC to state whether the financial entries contained in Appendix A of the DOJ agreement are correct or incorrect. This is a simple Request. The Request relates directly to CIBC's knowledge that Enron inflated its income through the use of the FAS 125/140 transactions it engaged in with CIBC. Since Lead Plaintiff filed its Motion to Compel on April 13, 2004, CIBC has provided no information as to the accuracy of the information in Appendix A. Lead Plaintiff has given CIBC ample time to respond. CIBC claims, yet again, it is constrained from responding because of its agreement with the DOJ. *See* Opp. at 15. The fact that CIBC agreed, as part of its settlement with the DOJ, not to contradict the factual statements set forth in Appendix A is unrelated to answering RFA No. 2. That is a term CIBC agreed to, not Lead Plaintiff. CIBC cannot hide behind its agreement with the DOJ and refuse to answer RFA No. 2.

G. CIBC's Response to Request for Admission No. 3 Does Not Serve the "Interest of Accuracy," But Rather Confuses

Request for Admission No. 3 asks CIBC to admit that it engaged in FAS 125/140 transactions with Enron, "knowing that Enron's purpose in entering these transactions was to remove assets from its balance sheets and book earnings and/or cash flow at quarter and year-end." Ex. B to Motion, at 2. CIBC's Response appended a footnote with a long qualification based on the "distinction between Canadian Imperial Bank of Commerce (a distinct corporate entity) and its corporate subsidiaries." Ex. C to Motion, at 5. The Response vitiates CIBC's admission and unnecessarily argues CIBC's "shell game" defense which other banks unsuccessfully raised by summary judgment motions.

CIBC's excuse for the footnote is that it was required "[i]n the interest of accuracy." Opp. at 8. Once again, CIBC says in its Response it was explaining the meaning of its agreement with the DOJ. According to CIBC, "[i]n the particular context of the CIBC/DOJ Agreement, it was deemed appropriate" to not point out the corporate distinctions recited in its verbose qualification in its Response. *Id.* But (once again) Lead Plaintiff does not seek an admission concerning the context of the CIBC/DOJ agreement or ask CIBC to admit to the meaning of that agreement.

If CIBC's goal was to serve "the interest of accuracy," then it could have identified the subsidiary or subsidiaries to which it obliquely referred in its lengthy footnote qualification to its Response to Request for Admission No. 3. Indeed, Lead Plaintiff propounded an interrogatory upon CIBC requesting that CIBC identify the wholly-owned direct or indirect subsidiaries of Canadian Imperial Bank of Commerce referenced in its footnote. CIBC's response, specifically what CIBC would call the "actual words" of its response, is:

> **RESPONSE:** CIBC objects to Interrogatory No. 19, which is duplicative of interrogatories served by Lead Plaintiff and answered by CIBC previously in this litigation. Specifically, Lead Plaintiff's Interrogatory No. 1 to CIBC states:

> "Identify each of Your business, operating units, direct or indirect subsidiaries, divisions, affiliates, predecessors, successors, partners, special purpose entities that had or has a business relationship or business affiliation with Enron or any of its SPEs, Trusts, LJM partnerships, subsidiaries, affiliates, partners, any Enron-sponsored entity or the Individual Defendants."

Lead Plaintiff's Interrogatory No. 2 states:

> "For each entity identified in Interrogatory No. 1, described in detail: (i) the business relationship or business affiliation between You and each entity; (ii) the business relationship or business affiliation between each entity and Enron or any of its SPEs, Trusts, LJM partnerships, subsidiaries, affiliates, partners, any Enron-sponsored entity or the Individual Defendants; and (iii) the name and substance of any transaction involving each entity identified in Interrogatory No. 1"

Footnote 1 to CIBC's Response to Request for Admission No. 3 states:

> "Appendix A to the CIBC/DOJ Agreement refers to "CIBC" as the 3% equity investors in a number of FAS/125/140 transactions. In fact, Canadian Imperial Bank of Commerce, as a district corporate entity, did not invest in the equity component of the FAS 125/140 transactions. Rather, the 3% equity component was provided by wholly-owned direct or indirect subsidiaries of Canadian Imperial Bank of Commerce. For the sake of convenience Appendix A and these Responses refer to "CIBC" as the equity investor. By using that shorthand reference, CIBC does not intend to blur the distinction between Canadian Imperial Bank of Commerce (a distinct corporate entity) and its corporate subsidiaries (which are also distinct corporate entities) nor should the shorthand reference be construed as suggesting in any way that the corporate distinction between Canadian Imperial Bank of Commerce and its wholly-owned direct or indirect subsidiaries was not fully and properly maintained and observed.

In response to Interrogatories Nos. 1 and 2, CIBC provided a lengthy narrative response, together with two comprehensive appendices that identified all transactions between CIBC (and CIBC affiliates) and Enron (and Enron affiliates). Those appendices identify the wholly-owned direct or indirect subsidiary of CIBC that provided the 3% equity with respect to each of the FAS 125/140 transactions, as that term is defined in the December 22, 2003 Agreement between CIBC and the United States Department of Justice acting through the Enron Task Force (the "CIBC/DOJ Agreement").

Such a response serves the interests of confusion and obfuscation and not accuracy and tends to further demonstrate CIBC is not complying with the Federal Rules of Civil Procedure in responding to Lead Plaintiff's discovery requests.

III. Conclusion

For all the reasons stated herein, Lead Plaintiff respectfully requests the Court deem admitted Requests for Admission Nos. 1 and 3-9, and require CIBC to, within seven days, fully respond with admission or denial, as to Request for Admission No. 2, as set forth in the order filed with Lead Plaintiff's Motion.

DATED: August 19, 2004

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL DEEMED ADMISSIONS BY CIBC (DOCKET NO. 2121) document has been served by sending a copy via electronic mail to serve@ESL3624.com on this August 19, 2004.

I further certify that a copy of the foregoing LEAD PLAINTIFF'S REPLY IN SUPPORT OF MOTION TO COMPEL DEEMED ADMISSIONS BY CIBC (DOCKET NO. 2121)document has been served via overnight mail on the following parties, who do not accept service by electronic mail on this August 19, 2004.

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Mo Maloney